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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	CC Docket No. 96-128

**COMMENTS OF THE
PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION
ON ISSUES IN THE SECOND REMAND**

PERSONAL COMMUNICATIONS
INDUSTRY ASSOCIATION

Robert L. Hoggarth
Senior Vice President, Paging & Messaging
PERSONAL COMMUNICATIONS
INDUSTRY ASSOCIATION
500 Montgomery Street, Suite 700
Alexandria, Virginia 22314-1561
(703) 739-0300

Scott Blake Harris
Kent D. Bressie
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, N.W., Suite 1200
Washington, D.C. 20036-2560
(202) 730-1300

Its Attorneys

Dated: July 13, 1998

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SUMMARY

To comply with the court's decision in *MCI Telecommunications Corp. v. FCC*, the Commission must finally choose between the market- and cost-based approaches that it has previously attempted to meld in its market surrogate methodology. In its public notice seeking comments in this second remand proceeding, the Commission has indicated a strong preference for maintaining a "carrier pays" system of payphone compensation. The Commission, however, cannot implement a carrier pays system without seriously inquiring about the costs of coinless payphone calls and about the need for consumer choice among a number of compensation options, including "caller pays." To date, the Commission has not engaged in such an inquiry or fully considered such options.

While the Personal Communications Industry Association ("PCIA") has long argued that a "caller pays" system remains the only viable market-based solution to payphone compensation, it also believes that caller pays has an important role as an option in a carrier pays system as an alternative to call blocking. A caller pays option is legally permissible and would enhance carrier and consumer choice.

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The court's decision in *MCI Telecommunications Corp. v. FCC* requires that the Commission finally choose between the market- and cost-based approaches that it has previously attempted to meld—to the detriment of carriers and consumers—into a single hybrid method of payphone compensation.[1] With a withering appraisal of the Commission's market surrogate methodology, the court has left the Commission little choice but to re-examine the fundamentals of its approach.[2] In its subsequent public notice, the Commission nevertheless indicated a strong preference for maintaining a "carrier pays" system of payphone compensation.[3] The Commission, however, cannot implement a carrier pays system without seriously inquiring about

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1 *MCI Telecommunications Corp. v. FCC*, 1998 U.S. App. LEXIS 9765 (D.C. Cir. 1998) ("*MCI*").

2 *Id.* at *6-7 (finding the Commission's action "unreasoned" and its reasoning "inadequate" and "utterly unhelpful").

and scrutinizing the costs of coinless calls from payphones and without seriously considering the need for carrier and consumer choice among a number of compensation options, including "caller pays." To date, the Commission has not engaged in such an inquiry or fully considered such options.

Part I of these comments provides background on the choices that the Commission must confront following the second payphone appeal. Part II argues that if the Commission pursues its likely course in retaining a carrier pays system, it must adopt a cost-based approach grounded in a critical examination of the costs by the Commission and the parties to this proceeding. Part III argues that the caller pays solution advocated by the Personal Communications Industry Association ("PCIA") remains the only viable market-based solution to payphone compensation, and still has an important role as an option in a carrier pays system.

I. THE COMMISSION MUST ADOPT A PRACTICAL AND LEGALLY SUPPORTABLE SYSTEM OF PAYPHONE COMPENSATION

In *MCI Telecommunications Corp. v. FCC*, the court made clear that the Commission's current system of payphone compensation is an unacceptable hybrid of market- and cost-based approaches.[4] Rather than pursue a market- or cost-based approach, the Commission undertook the oxymoronic task of prescribing a market rate. The court found the resulting system of

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3 Public Notice, "Pleading Cycle Established for Comment on Remand Issues in the Payphone Proceedings," DA 98-1198, CC Docket No. 96-128 (rel. June 19, 1998) ("*Second Remand Public Notice*").

4 *MCI*, 1998 U.S. App. LEXIS 9765, at *6-8.

payphone compensation unreasonable.[5] Now at the crossroads, the Commission must choose a market- or cost-based approach to comport with the terms of the court's remand.

It is apparent, as indicated in the public notice, that the Commission remains committed to a carrier pays system, even though the Communications Act of 1934, as amended, nowhere mandates such a system.[6] The court's decision in *MCI* did not preclude either a carrier pays or caller pays system. The court did make clear, however, that the Commission must demonstrate that costs and the compensation rate converge in order to save its so-called market-based system; otherwise, it will be forced to adopt a cost-based approach to preserve its carrier pays system.[7] At present, the Commission has not systematically collected or analyzed cost data. It cannot, therefore, justify any convergence between rate and cost, much less provide an authoritative basis for a cost-based system. While the Commission ostensibly engaged in its own study of costs, it did not make it available to the public, choosing instead merely to summarize it.[8] Clearly, further information is needed to support a cost-based, carrier-pays system of payphone compensation. Otherwise, the Commission will fail to comply with the terms of the court's remand.

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5 *Id. See also See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Second Report & Order*, 13 FCC Rcd. 1778, 1796 (1997) ("*Second Report & Order*") (assuming the $0.35 rate for coin calls as a starting point and subtracting costs to achieve a market rate for coinless calls).

6 *See Second Remand Public Notice*, at 2 (making only passing reference to other "market-based methodologies"); 47 U.S.C. § 276.

7 *MCI*, 1998 U.S. App. LEXIS 9765, at *8 ("In principle, a market-based rate—as opposed to a cost-based rate—could satisfy the statutory fair compensation requirement. . . . But some explanation of the logic of the derivation of the market-based rate is still required.").

In all prior phases of this proceeding, PCIA has advocated a "caller pays" system as the only viable market-based solution and the only system that maximizes carrier and consumer choice.[9] In a caller pays system, a consumer would deposit coins in the amount of the local coin rate to place a subscriber 800 or access code call from a payphone. Given the differences in the markets for coin and coinless calls, only a caller pays system could truly be called market-based. Only caller pays would put effective competitive pressure on a floating payphone compensation rate.

Even though the Commission has clearly declined to adopt caller pays as the primary vehicle for implementing payphone compensation for coinless calls, PCIA still believes that a caller pays option has a place in the overall solution to the issues presented in this docket. PCIA urges the Commission to adopt a caller pays option, to the extent technically feasible, as an alternative to call blocking.[10] Targeted call blocking, as originally envisioned by the Commission, remains largely unavailable. Moreover, call blocking imposes its own costs on carriers and consumers by discouraging toll-free calls from payphones. By allowing an

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8 *See Second Report & Order*, 13 FCC Rcd. at 1820-24.

9 *See, e.g.*, Further Comments of the Personal Communications Industry Association, CC Docket No. 96-128, at 7-13 (filed Aug. 26, 1997).

10 Consistent with the paging industry's desire for carrier and customer choice, AirTouch Paging has petitioned the Commission for a rulemaking on this option by proposing a dedicated 8XX code or block of numbers for toll-free calls placed from payphones is fully consistent with a cost-based, carrier pays system of payphone compensation. *See* AirTouch Paging Petition for Rulemaking to Establish a Dedicated 8XX Code for Toll-Free Calls Placed from Payphones, RM-9273 (filed Apr. 17, 1998) ("AirTouch Paging Petition"). Before reaching its final conclusions in this proceeding, the Commission should investigate

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interexchange carrier ("IXC") to elect a caller pays option within a carrier-pays framework—instead of any market surrogate or Commission-mandated, cost-based rate—consumers would always be able to place toll-free calls from payphones. Instead of having his or her call blocked, the caller would simply deposit coins to complete the call. PCIA urges parties to consider "caller pays" in this context, and is confident that customers of 800 numbers and members of the general public needing to complete toll-free calls from payphones would welcome this option as an alternative to call blocking.

II. THE COMMISSION MUST YET GATHER AND SCRUTINIZE THE NECESSARY DATA TO ESTABLISH A COST-BASED PAYPHONE COMPENSATION SCHEME

To implement its desired carrier pays system, the Commission must gather and subject to public scrutiny all of the cost information necessary for determining the costs of coinless calls. This information is necessary for responding to the court's remand in *MCI.*[11] This information is also necessary for resolving the issues raised in the Commission's public notice and for responding to the court's remand in *MCI.* Specifically, the Commission has asked for comment and evidence on "the extent to which costs and rates converge in the coin call market," "similarities and differences between the market segments for coin and coinless calls," and "market imperfections that might affect the use of the local coin rate as a market-based surrogate

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proposals for customer choice—including the AirTouch Paging petition and the technical issues it raises.

11 *See MCI*, 1998 U.S. App. LEXIS 9765, at *7 (concluding that "the Commission never went through the steps of connecting [its premise that the market rate for coin calls generally reflects the costs of those calls] with its reasoning in the Second Order.").

for coinless calls."[12] Clearly, an examination of costs must and will serve as an important focus of this second remand proceeding.

The Commission already has before it substantial cost data indicating that the cost of a coinless call ranges between 10 and 15 cents per call.[13] Yet the Commission has failed to scrutinize this data from payphone service providers ("PSPs") owned by local exchange carriers ("LECs"), which comprise the overwhelming majority of payphones currently in use in the United States.[14] The Commission has even failed to require submission of certain detailed cost studies, of which it is well aware. For example, it has declined to require Bell Atlantic to produce in this proceeding a copy of the New England Telephone study which it submitted in Massachusetts. That study indicates that the cost of a coinless call is 16.7 cents.[15] The Commission has also failed to examine the issue of incremental costs, which could serve to justify a measured rate approach.[16]

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12 *Second Remand Public Notice*, at 2.

13 *See* AT&T Petition for Reconsideration, CC Docket No. 96-128 (filed Dec. 1, 1997) (attaching Southwestern Bell Telephone Co.'s 1994 analysis of the revenues, expenses, assets, operating statistics, and other results and projections for its payphone business); Reply Comments of Sprint Corporation on Remand Issues, CC Docket No. 96-128, exh. 1 (filed Sept. 9, 1997) (analyzing LEC payphone costs and estimating a per-call cost of 6 cents).

14 The Commission also has not addressed the issue of which PSPs' costs should serve as the basis for a cost-based system.

15 *See* Sprint Corporation's Comments on Remand Issues, CC Docket No. 96-128, attach. A (filed Aug. 26 1997) (attaching the Massachusetts Department of Public Utilities' April 14, 1996, order, which cites payphone cost data of New England Telephone).

16 *See* Paging Network, Inc.'s Petition for Limited Reconsideration, CC Docket No. 96-128 (filed Dec. 1, 1997).

As customer of IXCs, which offer subscriber 800 services, PCIA's paging-carrier have no direct access to the relevant cost data in order to ascertain if the compensation rates in a "carrier pays" system are fair. That data remains in the hands of the PSPs, and so the burden of justifying those costs must fall on those PSPs. To the extent that further data is presented in comments on this second remand, PCIA reserves the right to comment more fully on that data in its reply comments.

PCIA's members do know first-hand that the level of these charges have a direct impact on the cost of subscriber 800 services. As IXCs charge customers more for these services in order to fund their compensation obligations, those increases are passed onto the general public.

III. CALLER PAYS REMAINS THE ONLY VIABLE MARKET-BASED SOLUTION AND SHOULD BE ADOPTED IN LIEU OF CALL BLOCKING

The Commission has long recognized that "the most appropriate way to ensure that PSPs receive fair compensation for each call," and to promote PSP competition, "is to let the market set the price" for payphone calls.[17] As made evidently clear in the court's opinion and at oral argument in the second payphone appeal, caller pays remains the only viable market-based system of payphone compensation.[18] Caller pays is not only legally permissible but fully

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17 *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, *Report & Order*, 11 FCC Rcd. 20541, 20567 (1996) ("*First Report & Order*").

18 *See MCI*, 1998 U.S. App. LEXIS 9765, at *6 (suggesting that the Commission's scheme "resemble[d] subtracting apples from oranges."); Transcript of Oral Argument in MCI Telecommunications Corp. v. FCC, Case No. 97-1675, at 45-46, 55-57 (D.C. Cir., argued May 7, 1998) (responding to Judge Silberman's criticism of the Commission's market surrogate methodology and his query whether the only alternatives were "cost-based or the

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achieves the fair compensation mandate of Section 276. Even if the Commission elects to retain a carrier pays system, however, it should include a caller pays option within that framework.

A. Caller Pays Is the Most Pro-Competitive Mechanism of Payphone Compensation and Would Enhance Carrier and Consumer Choice Even in a Carrier Pays Framework

By adopting a caller pays option for carriers who elect it in place of a market surrogate or Commission-mandated, cost-based rate, the Commission would provide carriers and consumers with more complete information and would not discourage payphone use. As with any other payphone call, the caller would hear a prompt indicating that a coin deposit is necessary to complete the call. The caller would know that a coin deposit—at the local toll rate—is required, and the caller would not be left wondering why the call did not go through.[19] With blocked calls, the present carrier pays system results in uncompleted calls and consumer uncertainty about whether or not a toll-free call from a payphone will be completed. A caller pays system, however, would guarantee consumer access to, and encourage further use and development of, 800 services through a simple coin deposit.

A caller pays system would provide consumers with greater certainty about—and access to—the services available from payphones than does the current carrier pays system. With the

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present rule," counsel for intervenor RBOC/GTE/SNET Coalition stated that petitioners "never came up with a single alternative, market-based proposal," while counsel for petitioners MCI, Sprint, and PCIA stated to the contrary that caller pays was most certainly presented to the Commission the only true market-based alternative which recognized that there were different markets for coin and coinless calls).

19 In many instances, targeted call blocking is not even available. The local exchange carriers ("LECs") continue to seek waivers of the requirements to provide the coding digits necessary for call blocking services even to be offered. These ongoing delays only underscore the need for an alternative to call blocking.

Commission's present carrier pays system, when an 800 subscriber requests that an IXC block payphone-originated calls, the caller is likely to experience one of two situations, and possibly a third. First, the call may simply not go through, in which case the caller will have no indication why the call was not completed. The caller may know that the 800 subscriber has blocked payphone calls, but the caller is just as likely to think that he or she misdialed, or that the number is no longer in service. Second, the caller may hear an intercept message stating the call did not go through, and again, the caller will have no idea why the call was not completed. Third, it may be possible to create a separate intercept message stating either that the toll-free service is not available from payphones. In all three cases, however, the 8XX code alone does not tell a caller whether or not the specific service—toll-free calling—will be available for a particular 8XX number at a particular payphone.

Should the Commission seriously consider a market-based approach, it must recognize that only a caller pays system would impose market discipline on payphone compensation rates.[20] The Commission has recognized that fair compensation could best be achieved "when the caller has the information necessary to make an informed choice as to whether to make the call and incur the compensation charge."[21] With the Commission's current market surrogate scheme, a caller has no incentive to impose market discipline on PSPs by "price-shopping" for payphones. The "market," therefore, cannot set the price in the manner envisioned by the Commission under the scheme established in the *Second Report & Order*.

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[20] *See* Further Comments of the Personal Communications Industry Association, CC Docket No. 96-128, at 7-11 (filed August 26, 1997).

[21] *First Report & Order*, 11 FCC Rcd. at 20551.

B. Caller Pays Remains Legally Proper

Caller pays remains legally proper as a means of providing payphone compensation to PSPs. Caller pays is permitted both by prior court decisions and by the Telephone Operator Consumer Services Improvement Act ("TOCSIA"). Moreover, caller pays would best serve the objectives of Section 276—and of the Commission—by expeditiously providing fair compensation.

First, prior court decisions do not require a carrier pays system of payphone compensation. In *Illinois Public Telecommunications Association v. FCC*, the court upheld the Commission's choice of a carrier pays system, but it did not state that Section 276 mandated such a choice.[22] Instead, it left open the possibility that if the realities of technology and the marketplace contradicted the Commission's conclusions, the Commission would need to re-examine the basis of its choice. The court upheld the Commission's choice of a "carrier pays" system on the basis of the Commission's findings that the ability to block calls from individual payphones was technologically feasible and would provide competitive leverage against excessive per-call compensation charges.[23]

The realities of technology and the marketplace *have* contradicted the Commission's initial conclusions. As the Commission's experience in implementing the *Second Report & Order* demonstrates, the current carrier pays system fails to provide real-time pricing information

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[22] 117 F.3d 555, 563 (D.C. Cir. 1997) ("*IPTA*").

[23] *IPTA*, 117 F.3d at 566-67.

and therefore imposes scant market discipline on PSPs. Moreover, technology has not kept pace with the Commission's expectations. Many local exchange carriers continue to seek waivers of the requirement to provide coding digits to PSPs—a necessity for the identification of payphone-originated calls in any system of call blocking.

Subsequently, in *MCI Telecommunications Corp. v. FCC*, the court held that the Commission's approach of carving costs out of the local coin rate was unreasonable as a market-based system of payphone compensation.[24] The court said nothing about the propriety of a caller pays system. If anything, the court's criticism of the Commission's hybrid approach leaves caller pays as the only viable market-based approach to payphone compensation.

Second, TOCSIA in no way prohibits a caller pays system of payphone compensation.[25] TOCSIA requires that the Commission "consider the need to prescribe compensation (other than advance payment by consumers) for owners of competitive public pay telephones for calls routed to providers of operator services that are other than the prescribed provider of operator services for such telephones."[26] These provisions do not preclude adoption of caller pays. TOCSIA's advance payment prohibition requires that providers of operator services "permit the consumer to terminate the telephone call at no charge before the call is connected" and "not bill for unanswered telephone calls in areas where equal access is available." [27] By merely requiring a

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24 *MCI*, 1998 U.S. App. LEXIS 9765, at *7-8.

25 *See also* Petition for Reconsideration of the Personal Communications Industry Association, CC Docket No. 96-128, at 5-7 (filed Oct. 21, 1996).

26 47 U.S.C. § 226(e)(2).

27 47 U.S.C. § 226(b)(1)(B), (F).

coin deposit to initiate a subscriber 800 or access code call, a caller pays system would not run afoul of the advance payment prohibition.

The issue of advanced payment arises only in the limited situation where a call made via a non-presubscribed carrier reached by means of an access code is not completed. TOCSIA's advanced payment prohibition applies only to providers of "operator services," defined as "any interstate telecommunications service initiated from an aggregator location that includes, as a component, any automatic or live assistance to a consumer to arrange for billing, completion, or both, of an interstate telephone call."[28] It does not apply to interstate telephone calls billed or completed through "automatic completion with billing to the telephone from which the call originated" or "completion through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer."[29] The advanced payment prohibition therefore excludes most payphone-originated toll-free calls, including calling card calls and most calls carried by messaging service providers. For those calls where the prohibition *does* apply, Congress specifically required the Commission to "consider the need to prescribe compensation."[30] Congress thus anticipated that uncompleted calls made via a non-presubscribed carrier reached using an access code might necessitate separate rules for payphone compensation, depending upon the scheme adopted pursuant to Section 276. Far from prohibiting caller pays, Section 226 actually anticipates such a means of compensation.

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[28] 47 U.S.C. § 226(a)(7).

[29] *Id.*

[30] 47 U.S.C. § 226(e)(2).

Third, a caller pays system remains the most effective means of expeditiously providing PSPs with fair compensation. By contrast, the present carrier pays system has deprived PSPs of timely compensation due to a variety of technical and administrative difficulties. Whether due to continuing waivers of the coding digit requirements or disputes between PSPs and IXCs regarding the terms and timing of payment, PSPs are simply not receiving the full per-call compensation anticipated by Section 276.

CONCLUSION

For the reasons set forth above, the Commission should modify its system of payphone compensation to comport with the court's mandate in *MCI Telecommunications Corp. v. FCC*.

Respectfully submitted,

PERSONAL COMMUNICATIONS
INDUSTRY ASSOCIATION

Scott Blake Harris
Kent D. Bressie
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, N.W., Suite 1200
Washington, D.C. 20036-2560
(202) 730-1300

Its Attorneys

Robert L. Hoggarth
Senior Vice President, Paging & Messaging
PERSONAL COMMUNICATIONS
INDUSTRY ASSOCIATION
500 Montgomery Street, Suite 700
Alexandria, Virginia 22314-1561
(703) 739-0300

Dated: July 13, 1998

CERTIFICATE OF SERVICE

I, Kent D. Bressie, do hereby certify that a copy of the foregoing Comments of the Personal Communications Industry Association has been sent by first-class mail, postage prepaid, on this 13th day of July, 1998, to the following:

Federal Communications Commission (2 copies)	Dorothy Attwood Chief, Enforcement Division Common Carrier Bureau Federal Communications Commission 2025 M Street, N.W., Room 6008 Washington, D.C. 20554
Federal Communications Commission	Robert Spangler Enforcement Division Common Carrier Bureau Federal Communications Commission 2025 M Street, N.W. Washington, D.C. 20554
Federal Communications Commission	Greg Lipscomb Enforcement Division Common Carrier Bureau Federal Communications Commission 2025 M Street, N.W., Room 6336A Washington, D.C. 20554
Federal Communications Commission	Larry Strickling Deputy Chief Common Carrier Bureau Federal Communications Commission 1919 M Street, N.W., Room 500 Washington, D.C. 20554
International Transcription Service	International Transcription Service 1231 20th Street, N.W. Washington, D.C. 20036
AirTouch Paging	Carl W. Northrop H. Ashton Johnston Paul, Hastings, Janofsky, & Walker LLP 1299 Pennsylvania Avenue, N.W., 10th Floor Washington, D.C. 20004-2400

American Public Communications Council	Albert H. Kramer Robert F. Aldrich Dickstein, Shapiro, Morin & Oshinsky, L.L.P. 2101 L Street, N.W. Washington, D.C. 20037
America's Carriers Telecommunications Association	Charles H. Helein Helein & Associates, P.C. 8180 Greensboro Drive, Suite 700 McLean, Virginia 22102
AT&T Corporation	Mark C. Rosenblum Richard H. Rubin Jody Donovan-May AT&T Corp. 295 North Maple Avenue, Room 3244J1 Basking Ridge, New Jersey 07920
Cable & Wireless, Inc.	Rachel J. Rothstein Director, Regulatory & International Affairs Cable & Wireless, Inc. 8219 Leesburg Pike Vienna, Virginia 22182
Communications Central Inc.	Barry E. Selvidge Vice President, Regulatory Affairs and General Counsel Communications Central Inc. 1150 Northmeadow Parkway, Suite 118 Roswell, Georgia 30076
Competition Policy Institute	Ronald Binz Debra Berlyn John Windhausen, Jr. Competition Policy Institute 1156 15th Street, N.W., Suite 310 Washington, D.C. 20005
Competitive Telecommunications Association	Danny E. Adams Steven A. Augustino John J. Heitmann Kelley, Drye & Warren, LLP 1200 19th Street, N.W., Suite 500 Washington, D.C. 20036

Competitive Telecommunications Association	Genevieve Morelli Executive Vice President and General Counsel Competitive Telecommunications Association 1900 M Street, N.W., Suite 800 Washington, D.C. 20036
Frontier Corporation	Michael Shortley Frontier Corporation 180 South Clinton Avenue Rochester, New York 14646
General Communication, Inc.	Kathy L. Shobert Director, Federal Affairs General Communication, Inc. 901 15th Street, N.W., Suite 900 Washington, D.C. 20005
Inmate Calling Service Providers Coalition	Albert H. Kramer Robert F. Aldrich Jacob S. Farber Dickstein, Shapiro, Morin & Oshinsky, L.L.P. 2101 L Street, N.W. Washington, D.C. 20037
International Telecard Association	Glenn B. Manishin Michael D. Specht Blumenfeld & Cohen - Technology Law Group 1615 M Street, N.W., Suite 700 Washington, D.C. 20036
LCI International Telecommunications, Inc.	Danny E. Adams Steven A. Augustino John J. Heitman Kelley Drye & Warren LLP 1200 Nineteenth Street, Suite 500 Washington, D.C. 20036
MCI Telecommunications Corp.	Leonard Sawicki Mary J. Sisak MCI Telecommunications Corp. 1801 Pennsylvania Avenue, N.W. Washington, D.C. 20006

MIDCOM Communications, Inc.	Laura H. Phillips Loretta J. Garcia Dow, Lohnes & Albertson, PLLC 1200 New Hampshire Avenue, N.W. Washington, D.C. 20036-6802
NATSO, Inc.	Lisa Mullings Associate Director, Government Affairs NATSO, Inc. P.O. Box 1285 Alexandria, Virginia 22313
PageMart Wireless, Inc.	Phillip L. Spector Patrick Campbell Paul, Weiss, Rifkind, Wharton & Garrison 1615 L Street, N.W. Washington, D.C. 20036
Paging Network, Inc.	Judith St. Ledger-Roty Wendy I. Kirchick Kelley Drye & Warren LP 1200 19th Street, N.W., Suite 500 Washington, D.C. 20036
Peoples Telephone Company, Inc.	Eric L. Bernthal Michael S. Wroblewski Latham & Watkins 1001 Pennsylvania Ave., N.W., Suite 1300 Washington, D.C. 20004
RBOC/GTE/SNET Payphone Coalition	Michael K. Kellogg Aaron Panner Kellogg, Huber, Hansen, Todd & Evans 1301 K Street, N.W., Suite 1000 West Washington, D.C. 20005
RCN Telecom Services, Inc.	Dana Frix William B. Wilhelm, Jr. Swidler & Berlin, Chartered 3000 K Street, N.W., Suite 300 Washington, D.C. 20007

Sprint Corporation	Leon M. Kestenbaum Jay C. Keithley H. Richard Juhnke Sprint Corporation 1850 M Street, N.W., 11th Floor Washington, D.C. 20036
Telaleasing Enterprises Inc.	Theodore C. Rammelkamp General Counsel Telaleasing Enterprises, Inc. 601 West Morgan Street Jacksonsville, Illinois 62650
Telecommunications Resellers Association	Charles C. Hunter Hunter Communications Law Group 1620 Eye Street, N.W., Suite 701 Washington, D.C. 20006
Teleport Communications Group, Inc.	Teresa Marrero Senior Regulatory Counsel - Federal Teleport Communications Group, Inc. Two Teleport Drive, Suite 300 Staten Island, New York 10301
United States Telephone Association	Linda Kent Keith Townsend Hance Haney United States Telephone Association 1401 H Street, N.W., Suite 600 Washington, D.C. 20005
WorldCom, Inc.	Richard S. Whitt WorldCom, Inc. 1120 Connecticut Avenue, N.W., Suite 400 Washington, D.C. 20036